(20)

No. 97-1235

In the
Supreme Court of the United States
October Term, 1997

CITY OF MONTEREY,

Petitioner,

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND MONTEREY-DEL MONTE DUNES CORPORATION,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide, including many property owners who are faced with confiscatory land-use regulations at the federal, state, and local levels. WLF has participated as amicus curiae in numerous Fifth Amendment regulatory takings cases in this and other courts. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting sound principles in diverse areas of constitutional law and policy, including regulatory takings. AEF has appeared with WLF as amici curiae in numerous cases before this Court, including *Dolan* and *Lucas*.

STATEMENT OF THE CASE

In the interests of judicial economy, amici adopt by reference the statement of the case as presented in the brief filed by respondents Del Monte Dunes, et al. (collectively "Del Monte"). Nevertheless, amici will briefly present those aspects of the case as are pertinent to the arguments presented in this brief.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party in this case authored this brief in whole or in part, and no persons or entities other than amicus Washington Legal Foundation, its supporters, or counsel, contributed financially to the preparation or submission of this brief. This brief is being filed with the written consent of the parties which have been filed with the Clerk.

Del Monte owned a 37-acre rectangular shaped parcel of land on the California coast within the City of Monterey ("City") that once was an industrial site. Del Monte wished to develop the property for housing in conformance with the local zoning plan which permitted up to approximately 900 multi-family units for this size property. JA 158. However, because of environmental and other concerns expressed by the City in its desire to keep the property in its natural state, Del Monte was forced over a period of years to drastically scale back its plans ultimately to 190 units. The City initially approved the 190-unit plan with conditions that Del Monte was forced to meet. Del Monte was required to dedicate the western one-third of the property, the dune area which fronted the ocean, because the City wanted to retain the property for public beach use and access. Del Monte was even required to build a parking lot for the public with access through its development. In addition to this conveyance of an interest in real property, the City also required the reservation of the eastern third of the parcel adjacent to the highway for as a public viewshed. That left only the remaining central portion of the property available for the development.

Unfortunately for Del Monte, that area contained buckwheat plants which are the habitat for the Smith's Blue Butterfly, an endangered species, which had not been seen on the property. Del Monte's offer to move the buckwheat habitat to the other areas of the property were rejected. While Del Monte was able to meet the conditions imposed, and would even *improve* the buckwheat habitat area, the City changed its mind and denied the permit. In effect, the City forced Del Monte to paint itself into a corner, and then told Del Monte it wasn't allowed to stand there.

Del Monte filed a civil rights lawsuit under 42 U.S.C. § 1983 claiming, *inter alia*, that the City had violated Del Monte's Fifth Amendment right to be free from

uncompensated takings of private property for public use. The City unsuccessfully argued that Del Monte's claim was not ripe for review because Del Monte did not seek to scale down its plans for a sixth time. The futility of further development proposals formed the basis of the Ninth Circuit's ripeness determination in *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1502 (9th Cir. 1990) (*Del Monte I*). The City did not further appeal this decision and its conclusion is the law of the case.

The case was remanded for trial and the jury found in Del Monte's favor after properly being instructed (at the insistence of the City) that a takings occurs if the denial of the permit denied Del Monte all economically viable use of its land *or* did not substantially advance legitimate state interests. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980). The jury awarded Del Monte damages for a temporary taking only, because during the litigation, the State of California, which had its eye on the property all along to be used as a state park, purchased the heavily restricted property at a substantially reduced price.

On the second appeal, the Ninth Circuit, in a well-reasoned opinion, affirmed the trial court's denial of the City's motion for judgment as a matter of law and for a new trial without a jury. *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996) (*Del Monte II*).

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that Del Monte's § 1983 civil rights action was properly tried before a jury. That conclusion is supported by both the historical context of § 1983 as well as the Seventh Amendment's guarantee to trial by jury inasmuch as Del Monte's action for damages against the City was in the nature of a

common law actions of trespass or tort, actions which were historically tried before juries.

The court of appeals also correctly found that there was sufficient evidence before the jury to support both theories of takings liability as instructed. This Court should reject the City's facile argument that the subsequent sale of the property to the State at a reduced price precludes a finding of a denial of all economically viable use of the property as a matter of law.

The City and its amici are mistaken in arguing that the "rough proportionality" standard of *Dolan v. City of Tigard* does not apply in this case because in their view, this case does not involve exactions or dedications of real property. Quite the contrary; the beach dedication, habitat conservation easement, and viewshed reservations of the kind in this case are all typical interests in real property that are regularly bought and sold. Even if "rough proportionality" does not apply in this case, this Court's taking jurisprudence demonstrates that a heightened level of scrutiny or review is required nevertheless, rather than the simple rational basis standard urged by the City.

ARGUMENT

I. DEL MONTE WAS ENTITLED TO A JURY TRIAL UNDER 42 U.S.C. § 1983 AND THE SEVENTH AMENDMENT

A. The Historical Context of § 1 of the Civil Rights Act of 1871 Shows That Congress Intended for All Substantive Liability Issues In Claims for Legal Relief under § 1983 to Be Decided by a Jury.

Before inquiring into the applicability of the Seventh Amendment, this Court first will inquire whether the statute in question may fairly be construed to provide the right to a jury trial. *Feltner v. Columbia Pictures, Inc.*, 118 S. Ct. 1279, 1283 (1998). Here, Section 1 of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, is a Reconstruction era statute enacted to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States.

As an initial matter, the question of whether Del Monte was entitled to a jury trial would be properly before this Court if Del Monte had lost its case tried before a judge after denying Del Monte's request for a jury trial. The City, which did lose, does not have a right *not* to have a jury, and any error in that regard is harmless. In any event, amici submit that the widespread practice of using jury trials in § 1983 actions, and numerous circuit court holdings that such jury trials are indeed required, are firmly supported by the historical context of § 1983.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court meticulously examined the legislative history of § 1983 to hold that a municipal corporation, such as the City of Monterey, is liable under § 1983 in a claim for money damages for the violation of a federal civil right. As *Monell* made clear, Section 1 of the Fourteenth Amendment was drafted with the case of *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833) in mind, in which a state court had denied compensation for an alleged uncompensated taking, and there was no federal remedy. Thus, Congress expressly intended § 1983 to provide a federal remedy for the practice, such as occurred prior to the adoption of the Fourteen Amendment, of uncompensated takings by municipal corporations. *Monell*, 436 U.S. at 686-87.

Congress certainly did not adopt a federal remedy for uncompensated takings (or the deprivation of numerous other federal rights, privileges, or immunities) because state remedies were not available.[2] Rather, the *Barron* case graphically illustrated the *inadequacy* of relying on state remedies to enforce federal constitutional rights. Thus, Congress enacted § 1983 precisely because a *federal* civil remedy was deemed to be the only adequate means for redressing the violation of a *federal* civil or private right, even though most states had adopted by this time, at least on paper, just compensation provisions in their respective constitutions.

The scope of relief provided under § 1983 must be interpreted within this remedial context. *Cf. Wyatt v. Cole*, 504 U.S. 169, 171 (1992) (KENNEDY, J., concurring). The language of the statute is inclusive, and strongly suggests that Congress intended the term "action at law" to have its full meaning, at least such as that was commonly understood in the federal courts of law around 1871 when § 1983 was enacted.

Prior to the merger of the courts of law and equity, liability in a claim for money damages against a municipal corporation was tried before a jury. *See, e.g., Pumpelly v. Green Bay Company*, 80 U.S. 166 (1871); *Transportation Company v. Chicago*, 99 U.S. 645 (1878); and *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883).

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[2] By 1871, Maryland, like most other states, had incorporated the principle of just compensation into its constitution. *See Moale v. Baltimore*, 5 Md. 314 (1854). The 1796 corporate charter of the City of Baltimore conferred on the City the right to sue and to be sued. This probably explains why the Maryland Court of Appeals did not object to the *Barron* case being tried at law. 7 Pet. at 244.

These were "actions on the case" which, like other law actions, were tried before juries. *See Feltner v. Columbia Pictures, Inc., supra,* 118 S. Ct. at 1285, 1286. Accordingly, Del Monte's claim for money damages against the City is an action at law triable before a jury under § 1983.

B. The Seventh Amendment Requires That a Jury Determine Liability in a Claim for Legal Relief under § 1983 for the Violation of a Federal Civil Right.

Even in the absence of any express legislative intent providing for a jury trial, or indeed, even where a statute purports to preclude a right to a jury trial, the Seventh Amendment guarantee of the right to a jury trial in a federal cause of action may nevertheless apply in an appropriate case. *Feltner v. Columbia Pictures, Inc., supra*; *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987); *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

In determining whether the Seventh Amendment requires a jury trial in a statutory action, this Court will first "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of equity and law." *Granfinanciera, S. A. v. Nordberg*, 492 U.S. at 41, quoting *Tull v. United States*, 481 U.S. at 417-18. Then this Court will "examine the remedy sought and determine whether it is legal or equitable in nature." *Ibid.*

The City argues that nothing equivalent to the modern civil rights complaint existed at common law. Pet. Br. at 22. This alleged "fact" leads the City to look for what it believes is the appropriate historical parallel to the modern practice. The City quickly concludes that an eminent

domain proceeding, for which it claims a jury was not required at common law, presents such a parallel. *Ibid.* at 23. The City is mistaken.

In the first place, the notion that juries were not employed in condemnation cases has been refuted.[3] Secondly, the City's conclusion does not follow from the premise that a takings action may be compared to a eminent domain action. Amici agree that the matter of who initiates a "takings" claim is not determinative of the Seventh Amendment right; but the petitioner is mistaken if it assumes that if the government is the initiator, no jury trial is required.[4] Further, the fact that "takings" claims and eminent domain proceedings may be alike in one respect does not mean that they cannot be distinguished on other grounds. Indeed, as amici will presently show, the case at bar is distinguishable from an eminent domain

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[3] Historical practice shows that trial by jury was usually available on appeal, even if not in the first instance. Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Northwestern University Law Rev. 144, 181 (1996) (hereinafter "Grant"). While amici believe that Grant is correct in his evaluation of English and colonial condemnation practice, amici nevertheless believe that the question is not determinative of the case at bar since "takings" claims owe their historical origins to common law conceptions of municipal liability in tort or trespass where juries were indisputably used to determine liability and damages.

[4] For example, when the government tries to "take" property in the form of assessing civil penalties for alleged violations of law, that proceeding is initiated by the government, and yet a jury trial still is required to determine whether the party should be held liable in the first instance. *Cf. Tull v. United States*, *supra*.

proceeding in terms of important common law principles.

Since *Bushell's Case*, Vaughan 135 (1670), the purpose of a jury at English common law has been to determine, not to advise. As this Court explained in *Feltner*, the phrase, "'Suits at common law' . . . refer[s] 'not merely [to] suits, which the common law recognized among its old and settled proceedings, but [to] suits in which *legal* rights were to be ascertained and *determined*, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Feltner v. Columbia Pictures Television, Inc.*, *supra*, at 1284 (quoting *Parsons* v. *Bedford*, 3 Pet. 433, 447 (1830) (second emphasis added).

In a similar vein, in *Bonaparte v. Camden & A. R. Co.*, 3 F. Cas. 821 (1838), the court traces the English common law jury back to the *Magna Carta*'s prohibition on the arbitrary seizure of property. Applying this principle to eminent domain, Justice Henry Baldwin, riding circuit, further explained:

> We are therefore of opinion that the trial by jury is preserved inviolate in the sense of the constitution, when in all criminal cases, and in civil cases *when a right is in controversy in a court of law*, it is secured to each party. In cases of this description [i.e. eminent domain cases], the right to take, and the right to compensation, are admitted; the only question is the amount, which may be submitted to any impartial tribunal the legislature may designate.

Id. at 829 (1838) (emphasis added). In other words, the English common law would allow the *estimate of the damages* in eminent domain to be decided by any impartial tribunal, but would require the issue of *liability* in criminal or civil proceedings to be decided by a jury. This Court

has reached a similar conclusion when considering the right to a jury trial within the context of civil penalties. *Tull v. United States*, 481 U.S. 412 (1987). *Compare Bauman v. Ross*, 167 U.S. 548, 593 (1897) ("By the Constitution of the United States, the *estimate of the just compensation* for property taken for public use, under the right of eminent domain, is not required to be made by a jury") (emphasis added). Thus, if the City were to concede liability, amici would then agree that the case at bar would indeed be "analogous" to an eminent domain proceeding.[5]

In its haste to compare "takings" claims and condemnation proceedings, the City overlooks numerous and obvious alternative comparisons among common law actions. From an historical perspective, 19th-century "takings" claims against municipal corporations not only were considered analogous to common law trespass or tort claims, they *were* common law trespass or tort claims. *See, e.g. Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833); *Pumpelly v. Green Bay Company*, 80 U.S. 166 (1871) (action in trespass on the case); *Transportation Company v. Chicago*, 99 U.S. 645 (1878) (action in trespass on the case); *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108

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[5] This is a federal civil rights case involving an infringement of Del Monte's private right to be free from an uncompensated taking; it is not an "inverse condemnation" case filed under state law. The term "inverse condemnation" appeared for the first time in a federal circuit court decision in *Barnes v. United States*, 241 F.2d 252, 255, n. 10 (9th Cir. 1956), and in this Court in *United States v. Bodcaw Company*, 440 U.S. 202, 204 (1979). In each instance, the term was used within the context of an implied contract theory of liability under the Tucker Act (42 U.S.C. §§ 4601-4655). The case at bar is premised on the absence of a comparable state statutory provision applicable to Del Monte at the time of the taking.

U.S. 317 (1883) (nuisance). *See also Richards v. Washington Terminal Co.*, 223 U.S. 546, 556-58 (1914) (interpreting *Fifth Baptist Church, supra*, as a takings case). An "action on the case" or "trespass on the case" were common law actions that did not involve a physical occupation of property by another as would be the case for simple trespass. Yet such common law actions, which formed the basis of many of these cases, existed and, as previously noted, were triable before a jury at English common law before the merger of the courts of equity and law in 1872. *See Feltner v. Columbia Pictures Television, Inc., supra*, at 1285, 1286.

This practice did not change after the Revolution. Nor did it change merely because the target of the claim was a corporation established under government charter. The Fifth Amendment's Takings Clause did not alter the pre-existing forms of relief. It limited the ability of government to claim immunity from those pre-existing forms. Thus, while it may be said, as this Court rightly stated in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), that "The form of the remedy did not qualify the right," 482 U.S. at 315 (quoting *San Diego Gas & Electric Co.*, 450 U.S. at 655 (BRENNAN, J., dissenting)), it equally may be said, that the nature of the right did not qualify the form of the remedy. Otherwise, the Fifth Amendment's Takings Clause would become a limitation on the rights of the citizen, rather than on the power of government.

Municipal corporations were not entirely immune from suit under the English common law. Municipal corporations could, and commonly were, sued at law in actions sounding in contract, trespass on the case, nuisance, or other torts. *Maund v. Monmouthshire Canal Co.*, 4 M.

& G. 452 (1842); *Paine v. Partridge*, 1 Shower, 231 (1794); 1 Coke Inst. 68.[6]

Inspired by the adoption of the Just Compensation Clause at the federal level, citizens began bringing common law actions in state courts to vindicate what they perceived to be their right to compensation against municipal corporations. Such prototypical "takings" cases viewed the offending municipal corporation variously as being liable for violation of an implicit contract (*see e.g. The People v. Platt*, 17 Johns. 195, 217 (N.Y. 1819)), or as neglecting an affirmative obligation (*see e.g. Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816)), or as committing a common tort (*see e.g. Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38, 62 (1796)). Sometimes, an action was brought in equity, sometimes an action was brought at law, depending on the nature of the requested relief. In each case, where the right to compensation was recognized, pre-existing theories of municipal liability were applied to vindicate a uniquely American conception of the right to compensation.

One of the principle grievances of American colonists against England prior to the Revolution was the gradual expansion of jurisdiction of the vice-admiralty courts. *See* Grant, *supra*, at 149-159. While an action could not be brought against the Crown, common law recognized the

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[6] *See* Dwight Arven Jones, *A Treatise on the Negligence of Municipal Corporations*, § 15 at 21 (1892) ("There seems to be no time when corporations were wholly free from responsibility for torts by the common law... [F]or numerous instances are mentioned in the ancient books where corporations were made liable in actions on the case for trespass and other torts."). Municipal tort liability extended also to the neglect of a corporate duty which inflicted special damage. *Ibid*.

right of a citizen to bring an action at law against the sheriff, customs agent, or other public official who had conducted a search or seizure. The action required the public official to justify the reasonableness of the search or seizure before a jury of 12 men who had not been appointed by the Crown. Beginning with the Stamp Act of 1765, the British government began to transfer jurisdiction over a variety of searches and seizures to the vice-admiralty courts which sat without a jury. The vice-admiralty courts would certify the existence of probable cause, thereby precluding a subsequent common law action under the doctrine of *res judicata*. *Ibid.*, at 152-53.

Government may take property by an unreasonable local zoning regulation or an unreasonable application of an otherwise valid zoning regulations, just as easily as it may take property by an unreasonable seizure or assessment of a civil penalty. In each instance, the right to bring a subsequent action at law to contest the reasonableness of the seizure, and to have liability in that action determined by a jury of one's peers (who were not appointed by the Crown), is an important and historic restraint which the common law, and the Constitution, place on the power of government.[7] While government at all levels may at times find this limitation on the exercise of its powers to be inconvenient, it is nevertheless a restraint which our

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[7] *See e.g. Granfinanciera, S. A. v. Nordberg*, *supra*, at 61 ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.").

nation's history, and the legislative history of the Civil Rights Act of 1871, have proved necessary.[8]

II. THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE COURT OF APPEALS BECAUSE THE EVIDENCE SUPPORTED A FINDING THAT THE PERMIT DENIAL BY THE CITY DENIED DEL MONTE OF ECONOMICALLY VIABLE USE OF ITS LAND *OR* DID NOT SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS.

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[8] Amici recognize that a claim against the United States for just compensation under the Takings Clause must be brought to a special tribunal that sits without a jury "in the first instance." *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2144 (1998). *See also* Brief of the U.S. at 2, n.1, citing *Lehman v. Nakshian*, 453 U.S. 154 (1981); *see also ibid.* at 27, n.15. But this does not preclude a subsequent action at law (before a jury) against government officials attempting to enforce a confiscatory regulation or policy. *See, e.g., United States v. Lee*, 106 U.S. 196 (1882); *Hafer v. Melo*, 501 U.S. 21 (1991); *see also Surgett v. Lapice*, 49 U.S. 48 (1850) (an action of ejectment in a court of common law is strictly an action at law and in no respects analogous to proceeding in equity to remove cloud from title); *Higg-A-Rella, Inc. v. County of Essex*, 647 A.2d 862, 864 (N.J. Super) (1994); *Schwartz v. U.S. Dept. of Justice*, 435 F. Supp. 1203 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C. Cir.) (common law remedies may co-exist with and be broader in scope than statutory remedies on the same subject; a party may therefore invoke either one or both unless the statute expressly repeals such common law remedies). Nor would such a common law action against government officials infringe upon the sovereignty of the United States, or any other governmental entity for that matter.

A. The Appropriate Standard of Review

The City concedes (for obvious reasons) that the *Dolan* "rough proportionality" standard was not included in the instructions to the jury by the trial court. Nevertheless, the City believes that the Ninth Circuit's discussion of *Dolan* provides grounds for an unqualified reversal without orders for a new trial. Pet. Br. at 50.

At the outset, it is important to determine the appropriate standard of review. The Ninth Circuit discussed the *Dolan* decision in the course of the court's affirmance of the trial court's denial of the City's motion for judgment as a matter of law (formerly judgment n.o.v.). The Ninth Circuit recognized that a trial court's denial of a motion for judgment as a matter of law under Rule 50(b) is subject to *de novo* review on appeal. *Del Monte II* at 1426. The function of an appellate court reviewing the denial of a motion for judgment as a matter of law is essentially the same as the trial court. *Schwimmer v. Sony Corporation of America*, 677 F.2d 946, 951-52 (9th Cir. 1982). *See also Strain v. Payette School District*, 134 F.3d 379 (9th Cir. 1998); 5A *Moore's Federal Practice*, § 50.07(2) (2d ed. 1981). Rule 50(b) and the controlling standard of appellate review of a trial court's denial of a motion under Rule 50(b) give effect to important Seventh Amendment principles prohibiting the reexamination of a jury's factual findings except as provided by common law.

Even if, for the sake of argument, the Ninth Circuit came to the correct conclusion for "all the wrong reasons", that would not justify disturbing the jury's verdict. A party who prevailed in the court of appeals can have the judgment affirmed on any valid grounds, not just the ones articulated by the court. *J.E. Riley Inv. Co. v. Commissioner of Internal Rev.*, 311 U.S. 55, 59 (1940).

Cf. Fed. Rule Civ. Proc. 61 (all errors and defects to be disregarded if "substantial rights of parties" are not affected).[9]

In the case at bar, the jury was instructed to find in favor of Del Monte if "the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the claims proposal and legitimate public purpose," *or* if the permit denial deprived Del Monte of the "economically beneficial use" of its land. *Del Monte II*, at 1428. As the City does not object to these jury instructions (after all, the City insisted on them), the

[9] Amici recognize that in limited circumstances, this Court has subjected the determination of a trial court or state court to *de novo appellate* review because the nature of the underlying issue calls for "the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *United States v. Bajakajian*, 118 S. Ct. 2028, 2038, n.10) (1998) (determining the excessiveness of criminal fine imposed by trial court), citing *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (imposition of judicial nction by trial court). The City's reliance on *Ornelas*, Pet. Br. at 31, is misplaced in the context of the issues in this case. *Ornelas* and *Bajakajian* say nothing about whether an issue should be submitted to a jury in the first place. Rather, they deal only with the standard of appellate review of a trial judge's finding with respect to issues *not* traditionally decided by juries where the application of a constitutional standard is concerned. In the case at bar, however, the Seventh Amendment's Reexamination Clause provides the rule for appellate review of jury verdicts.

Nor does it follow that the jury's verdict may be nullified by supposed inconsistent findings by a trial judge when the verdict is supported by the evidence. *See Benner v. Tribbitt*, 190 Md. 6, 15 (1947) ("If any of the issues submitted to a jury were material or pertinent, the verdict (if supported by evidence) cannot be nullified by contrary findings by the court.").

question is simply whether the jury's verdict is supported by the evidence.[10]

B. The Evidence Showed Del Monte Was Denied All Economically Viable Use of its Property; The Purchase of Property by a Government Agency for Public Uses Does Not Establish a Defense to that Claim.

There can be no doubt that the jury was presented with sufficient evidence demonstrating that the denial of the permit denied Del Monte the economically viable use of its

[10] The jury rendered a general verdict which did not differentiate between the two alternate theories of takings liability. An error in the instructions or submission of evidence on one theory of liability sometimes requires a new trial. But the court of appeals and this Court has the discretion to attribute the verdict to the alternate theory. *Traver v. Meshiry*, 627 F.2d 934, 938 (9th Cir. 1980) (KENNEDY, J.) ("Where more than one theory of recovery has been submitted to the jury in a civil case, and where on appeal it is claimed that as to one of the theories there was a lack of evidential support or an error of law in submitting the theory to the jury, the reviewing court has discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error."). The court below, however, believed it had to determine whether the evidence supported *both* theories of takings liability. *Del Monte II* at 1428, citing *Syufy Enter. v. American Multicinema*, 793 F.2d 990, 1001 (9th Cir. 1986). While amici believe this case lends itself more to the *Traver* either/or analysis, the evidence supports both theories of takings liability. In any event, the question of appellate review of a jury verdict is to be resolved by common law as provided by the Seventh Amendment's Reexamination Clause.

property. Del Monte showed that the City exacted the western one-third of the property for public beach use and access and the eastern third for a public viewshed. Finally, Del Monte showed that the City's categorical permit denial prevented Del Monte from building on the remaining portion of the parcel in order to protect butterfly habitat. Del Monte's experts concluded that the property was left essentially unmarketable. (JA 254-258.) Del Monte met its initial burden of production. In response, the City evidently failed to meet its burden of production to either rebut the factual basis of Del Monte's denial of economic viability claim or to mount an affirmative defense. Rather, the City presented as a defense only the purchase of the subject property by a government agency in 1991 for half of its value. *See* Pet. Br. at 10.

The court of appeals correctly rejected the City's argument that, as a matter of law, the purchase of the property precluded a finding of a taking by the jury on the economically viable use theory. *Del Monte II* at 1432. In doing so, the court articulated several compelling reasons why such a buy-out does not obviate a finding of a taking. *Id.* at 1432-33. Amici note that the reduction in value of Del Monte's property caused by development restrictions and the subsequent purchase of this white elephant by the government "on the cheap" is simply a new variation of an old theme.

Early Euclidean zoning was designed primarily to separate incompatible uses and to promote orderly development. *See generally*, Zeigler, 1 *Ratkopf's The Law of Zoning and Planning* §§ 1.01 *et seq.* at 1-1, 1-22 (1991); and Anderson, 1 *American Law of Zoning* §§ 3.07 *et seq.* at 96-104 (1986). More recently, the use of special zoning districts and *ad hoc* land use techniques have become commonplace; yet their use raises concerns not implicated by more conventional forms of zoning. This is particularly

so where contributions of land or money are exacted on a more or less *ad hoc* basis, *see Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), or where, as here, the government authorities practically reserve the land for a use that closely resembles a common object of eminent domain. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The history of zoning law provides numerous examples of confiscatory restrictions imposed to preserve the social amenity of undeveloped land for the benefit of existing residents. The cases of "buffer zoning" come to mind. *See, e.g., Spaid v. Board of Co. Comm'rs*, 259 Md. 369, 269 A.2d 797 (1970); and *Dowsey v. Village of Kensington*, 177 N.E. 427 (N.Y. 1931). *See also Troy Campus v. City of Troy*, 349 N.W.2d 177, 180-81 (Mich.App. 1984) (traffic problems caused by previous zoning decisions cannot be solved by downzoning last vacant lot in a commercial district to residential use); and *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1073-74 (STEVENS, J., dissenting) (citing cases). The more developed a surrounding area becomes, the more valuable its remaining undeveloped land becomes for the social amenity which the undeveloped land provides. Sometimes neighboring residents mistakenly believe that they have a legal right to the *status quo*. Where land is reserved for use in its natural state, as it is being required here, there is the *heightened* risk (as opposed to a typical risk associated with other land use regulations), that it is being pressed into some form of public service. *See Lucas v. South Carolina Coastal Council*, 505 U.S. at 1018. However, the

reservation of land for other public or quasi-public uses presents many of the same concerns.[11]

For example, street reservation statutes go back almost as far as this nation's history. See *Bauman v. Ross*, 167 U.S. 548 (1897). In the 19th century, municipalities commonly established general plans to guide future development of the city in the placement of streets and roads and other public facilities. Land was commonly reserved for future public improvements at the time of subdivision plat approval. The land was then opened using the power of eminent domain. It didn't take long for someone to figure out that it might be cheaper to acquire the land for a needed public street or road if the land remained in an undeveloped condition.

Thus, by an act of 1817, the City of Baltimore provided that when a street should be opened, only nominal damages would be paid to the owner of the land lying within the roadbed since the land was to be valued as unimproved and un-improvable. The Maryland Court of Appeals termed the act of 1817 "which denies to the proprietor the use of his land, as nothing short of an act of confiscation." *Moale v. Baltimore*, 5 Md. 314, 321-22 (1854). *See also Md.-Nat'l Cap. P. & P. Comm'n v.*

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[11] D. Hagman distinguishes the "reservation" of land from its formal"dedication" because, "Dedication ordinarily involves the conveyance of an interest in land by the fee owner to the public....Reservation, on the other hand, involves no conveyance but restricts the right of the subdivider and others to use the land for anything but the restricted purpose." *Id.*, *Urban Planning and Land Development Control Law* § 140 at 259 (1975). From the property owner's perspective, reservations may be worse than dedications because the property owner continues to pay taxes on reserved land, while enjoying none of the property's private benefits.

Chadwick, 286 Md. 1 (1979); *Lomarch Corp. v. Mayor of Englewood*, 51 N.J. 108, 237 A.2d 881 (1968); *Hoyert v. Bd. of County Commissioners*, 262 Md. 667, 278 A.2d 588 (1971) (attempt to depress value of property in anticipation of subsequent condemnation declared invalid); and *Carl M. Freeman, Inc. v. St. Rds. Commission*, 252 Md. 319, 250 A.2d 250 (1969) (ordinance declared invalid because its sole purpose was to freeze land values). The difference between the reservation statutes denounced in *Moale*, *Chadwick* and *Lomarch*, and the "buffer" zones denounced in *Spaid* and *Dowsey*, was that the reservation statutes at least acknowledged the obligation to pay *something* for land, albeit at an unspecified future date.

The City of Monterey's intense interest since at least 1984 in the public acquisition of Del Monte's land is well established in the record. R.T. 215-17 (Letter from Mayor of Monterey to California Coastal Commission dated June 13, 1984 endorsing plans by State to purchase the property as being "fair" to the owner). The State of California in fact found funding for the acquisition subsequent to the 1986 permit denial, and the property was purchased in 1991 for $4.5 million, about half the value of the property had the City not denied even the drastically scaled-down project. R.T. 709. We may assume that there was a legitimate public need for dune access, viewshed, and butterfly habitat in the vicinity of Del Monte's property at the time the permit was denied, and that the State of California's subsequent acquisition of the property served a legitimate public purpose. The question is whether the means by which the City set about achieving its goal bear the necessary connection to this objective.

Considered within the context of the exactions, the City's categorical denial of Del Monte's permit application effectively restricted Del Monte's right to use its property for anything but the restricted purposes of dune access,

viewshed and butterfly park, pending subsequent public acquisition at an unspecified future date. The State of California did in fact subsequently acquire the property, but in so doing, compensated Del Monte only for the value of the land subject to restriction. (JA 259-260, 264). As previously stated, this is just a new variation on an old theme. At least in Moale's case, Baltimore bothered to enact legislation purporting to justify the confiscation.

Reservation statutes have long been associated with uncompensated takings by municipal corporations. This perhaps explains why most courts decline to accept certain *public* or *quasi-public* uses as establishing an economically beneficial use of land. Such uses include parking facilities, parks, schools, public housing and recreational facilities. *Troy Campus v. City of Troy*, 349 N.W.2d, at 180-81. *See* Zeigler, 1 *Ratkopf's The Law of Zoning & Planning* § 6.07[6] at 6-48, 6-51 (1991) (discussing cases). *See also Bowles v. United States*, 31 Fed. Cl. 37, 48-49 (1994); *Formanek v. United States*, 26 Cl. Ct. 332, 340-41 (1992); *Lucas*, 505 U.S. at 1019 (listing federal and state statutes permitting acquisition of private lands for public use). This Court should affirm the court of appeals and make it clear that the willingness of a government or non-profit agency to purchase land for a public use is insufficient to defeat a "takings" claim as a matter of law.[12]

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[12] In any event, as the lower court correctly stated, the test is whether the restrictions have denied the owner all economically viable *use* of the property; not whether the property has some residual value that can be realized only by disposing of it. *Del Monte II* at 1432-33.

C. An Adjudicative Decision to Restrict the Use of Certain Property Should Be Subjected to Heightened Scrutiny under the Just Compensation Clause.

In *Dolan v. City of Tigard*, this Court applied the maxim first enunciated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), that a land use regulation is confiscatory "if not reasonably necessary to the effectuation of a substantial government purpose." 512 U.S. at 388, quoting *Penn Central*, 438 U.S. at 127. In the context of a developmental exaction, this Court determined that a regulation requiring the conveyance of property was not "reasonably necessary" to effect a substantial public purpose unless the exaction was "roughly proportional" to needs created by the landowner's proposed new use of his property. *Dolan, supra*, at 391. This Court has not yet defined the degree of necessity that is required to support land use regulations in many other contexts. But it is clear that the "reasonably necessary" standard continues to serve as the "floor" or level from which to evaluate land use regulations. So the question in this case is (1) whether the *Dolan* "rough proportionality" standard applies to the case at bar, and (2) if it does not, does the "reasonably necessary" test of *Penn Central* require a greater degree of review or scrutiny than the rational basis test under the Equal Protection Clause as urged by the City. Amici submit the answer to both questions is "yes."

The City and its supporting *amici* urge that the "rough proportionality" standard enunciated in *Dolan* should never apply to a takings claim that is predicated on a permit denial. The problem with this argument is that the Dolans advanced their claim in the form of an appeal from the denial of a variance permit. *Dolan*, 512 U.S. at 381.

Similarly, while the California Coastal Commission issued the Nollans' building permit with conditions to which the Nollans objected, the Commission just as easily might have rejected the permit application outright because the Nollans refused to accept the permit conditions. Clearly, a permit denial provides just as good an occasion to test the constitutional propriety of an exaction as a permit issuance.

The City and its supporting *amici* also attempt to distinguish *Nollan* and *Dolan* from the case at bar because the former involved *physical invasions*, while the case at bar supposedly involves a mere restriction on Del Monte's use of its land. This objection fails because the factual premise of this argument is erroneous. The City exacted a beach/dune access easement from Del Monte comparable to the easements exacted from the Nollans and Dolans.

This Court distinguished the Dolans' case from traditional zoning regulations because *Dolan* involved an *adjudicative* decision[13] to condition a permit application for an individual parcel, and because it involved the actual *conveyance* of property to the city in the form of a "permanent recreational easement" that would not merely regulate the Dolans' right to exclude others from their property, it would "eviscerate" it. 512 U.S. at 394.

The case at bar also involves an adjudicative decision to condition certain land and it involves actual conveyances and dedications which would require the public to trample upon Del Monte's property, thereby eviscerating Del Monte's right to exclude. There can be no doubt that a taking of Del Monte's property by the City was required as

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[13] Indeed, *Dolan* made clear that the burden of proof "properly rests on the city" *because* it had made an adjudicative decision to condition the Dolans' building permit application. 512 U.S. at 391, n.8.

a condition for any development to occur on the property, much like the scenario in *Dolan*. *Dolan* considered the "rough proportionality" standard as part of its discussion of what *defenses* would be available to government entities facing such *partial* takings claims. And while much of Del Monte's property is being required to be dedicated, this Court has never held that physical invasions or formal conveyances or dedications are the *only* means by which takings of property interests may occur. *See, e.g., San Diego Gas & Electric Co.*, 450 U.S. 621 (1981), in which five members of this Court recognized that a mere zoning regulation affecting a portion of a parcel could effect a taking; and *Howard County v. JJM, Inc.*, 301 Md. 256, 280-81, 482 A.2d 908 (1984).[14] In short, the dedication and reservations involved in this case constitute habitat, conservation, and viewshed easements; these are property interests which are bought and sold all the time. Amici thus find it odd that the City and its supporting amici are actually advocating that this Court strip them of a defense (*Dolan*'s "rough proportionality" standard) to such takings.

Del Monte also argued in the trial court that the City's exactions were unreasonable, and thus not reasonably necessary to advance the City's stated objectives. The City's denial of Del Monte's permit application effectively reserves one-third of the parcel as butterfly habitat, which itself may be deemed an exaction. *Howard County v. JJM Inc.*, *supra*. In effect, the City progressively exacted the entire parcel and now has the audacity to claim that *Dolan*

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[14] Even if the California Coastal Commission had passed a regulation prohibiting all coastal landowners who receive a building permit from interfering with beach access by the public on the owner's property, the restriction would nevertheless be confiscatory.

does not apply at all because there is nothing left of the parcel for the City to rely on in its defense to justify the exactions![15] Thus, while the *Dolan* "rough proportionality" test may not necessarily apply to *every* kind of land use regulation, the court of appeals below nevertheless had ample reason to apply the standard here.

At the same time, the real problem with the City's argument is its casual assumption that the standard of review under the Takings Clause necessarily defaults to the minimal level of scrutiny applied under the Equal Protection Clause of the Fourteenth Amendment whenever the *Dolan* "rough proportionality" standard is found not to apply[16]. This Court's decisions allow for no such result. Justice Brennan argued the position advanced by the City and its supporting *amici* very forcefully in *Nollan,* citing virtually the same due process and equal protection cases.

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[15] The City cannot escape the *Dolan*'s applicability by simply denying *all* development. Thus, a proportionality test would have applied to the Dolans' property even if, instead of seeking a building permit to expand its already existing hardware store, the Dolans wanted to build a new hardware store on vacant land, and were told that a building permit would be conditioned on bike-path and floodplain exactions.

[16] The City assumes that the standard of review in the case at bar is the same as the standard of review under the Due Process Clause or the Administrative Procedures Act because the City mistakenly assumes that the issue before this Court is the same as the issues presented before the City Council which denied Del Monte's permit application. In fact, the issue in the case at bar is not whether the City's actions were arbitrary and irrational, but who should pay for the otherwise reasonable purpose of preserving Del Monte's land for beach access, viewshed, and butterfly habitat.

See Nollan, 483 U.S. at 843 (BRENNAN, J., dissenting). This Court nevertheless held that the challenged land use regulations were confiscatory despite the fact that they were "rationally based."

This Court has never held that only one standard of review applies to all takings claims regardless of the nature of the regulation or the private interests affected[17]. In the case at bar, the City has made an adjudicative decision to restrict individual property in a manner that is in derogation of important common law rights. The level of interference is severe, even assuming that it is not complete. Also, the City's discretion is extremely broad to approve, or not to approve, anywhere from 0 to 900 homes on the subject property.

In short, there is good reason why the City's actions should be subject to heightened scrutiny even if *Dolan*'s "rough proportionality" is found not to apply. At a minimum the City should have the burden of explaining why it had to deny Del Monte's permit application categorically, without any further guidance as to how to make the project acceptable. While the City is not required to adopt the least restrictive means, its refusal to accept obvious and suitable alternatives (after numerous attempts by Del Monte to meet the City's concerns) to a total ban on development create the heightened risk that Del Monte's

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[17] There is thus no particular reason to believe that a regulation restricting the right to build on one's own land, *Nollan, supra*; *Dolan, supra*; *Lucas, supra*, or the right to dwell with whomever one chooses, *Moore v. City of East Cleveland*, 431 U.S. 494, 513–521 (1977) (STEVENS, J., concurring in judgment) needs to be subjected to the same level of judicial review as regulations governing rent control, *Yee v. City of Escondido, supra*, or a retirement health benefits plan. *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998).

land is being pressed into some form of public service under the guise of regulating the use of land.

D. The City's Own Testimony Shows That it Is Liable for Taking Del Monte's Property.

Ordinarily, a jury's verdict is judged in relation to the instructions to the jury. But "a reasonable jury is presumed to know and understand the law, the facts of the case, and the realities of the market." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243 (1993). The jury had plenty of evidence to support a finding that Del Monte's property was effectively being denied any economically viable use.

Del Monte also introduced evidence to show that the City's categorical permit denial was not "reasonably related" to any of the City's stated objectives. *Del Monte II*, at 1429-30. The City produced its own experts who testified that the City's categorical denial of Del Monte's permit application was necessary. Whatever else may be said about the City's denial of Del Monte's permit application, it is clear that it was *categorical*, without any further direction as to how the project might be made acceptable to the City. The City categorically rejected a proposal to build 190 homes.

Yet after this action was initiated, the State of California acquired the subject property. In calculating the purchase price, "the State relied upon an appraisal that assumed that the highest and best use of the property was for residential development with a density of up to 150 units." Pet. Br. at 10. At trial, the City shamelessly introduced this appraisal as proof of the continuing economic viability of Del Monte's property subject to restriction. *Ibid*. By introducing the appraisal, the City effectively concedes that 150 homes could have been built

consistent with the City's legitimate objectives. Why then did the City need to deny Del Monte's permit application *categorically*? Because 150 homes have to go someplace, a reasonable jury might have inferred that one or more of the restrictions placed on the subject property by the City were not reasonably necessary to achieve the City's stated objectives. In short, the City is impeaching their own experts by suggesting the 150 units could have been built on the property despite all the alleged environmental concerns. Given this internal conflict in the City's own statement of the facts, the jury reasonably might have inferred that the City's real purpose was other than the stated ones.

This Court has often repeated the maxim that a land use regulation may be confiscatory "if not reasonably necessary to the effectuation of a substantial government purpose." *Dolan v. City of Tigard*, 512 U.S. at 388. But this Court has never explained the reasons for this rule. Perhaps it is simply the fact that land use regulations that do not substantially advance the *stated* public objectives so often are found to be directed towards some unstated public goal such as acquiring the land without having to pay for it. *See Nollan*, 483 U.S. at 837 ("Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of

compensation.").[18] In any event, the case at bar confirms the wisdom of this rule.

Ordinarily, a party to litigation is assumed to present the facts in the light most favorable to its case. Where, as here, a party is liable according to its own statement of the facts, a reviewing court need look no further. Nor should a reasonable jury have to look further.

CONCLUSION

For the foregoing reasons, amici curiae urge this Court to affirm the judgment of the court of appeals.

Respectfully submitted.

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[18] The jury was instructed that the City's "underlying motives and reasons are not to be inquired into." *Del Monte II*, at 1429. This must refer to the *personal* motivations of the City Council members. The jury was not obligated to assume that the public purpose of the permit denial was limited to the purposes stated by the City.